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71-8001

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In the Supreme Court of the United States

OCTOBER TERM — 1971

SAMUEL COHEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on October 1, 1971.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 448 F.2d 1224 and is printed in full as an Appendix hereto, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*) was entered on October 1, 1971. A timely Petition for Rehearing was filed by Petitioner herein on October 14, 1971. Such Petition for Rehearing was denied by the Court of Appeals on November 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Where the Commodity Exchange Act makes criminal a sale which "results in giving" a trader a futures position in excess of permissible position limits, are additional sales above such limits each separate crimes justifying cumulative punishment?

STATUTES AND REGULATIONS INVOLVED

Section 6a (2) (B), Title 7, United States Code, provides in pertinent part:

> "[I]t shall be unlawful for any person—
>
> * * *
>
> (B) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market, any amount of such commodity that shall result in giving such person a net long or net short position at any one time in or with respect to any such commodity in excess of any trading limit fixed by the commission for net long or net short position in such order for or with respect to such commodity."

Section 6a (2) (B), Title 7, United States Code, as amended February 19, 1968, Public Law 90-258, provides in pertinent part:

> "[I]t shall be unlawful for any person-
>
> * * *

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity: *Provided,* that such position limit shall not apply to a position acquired in good faith prior to the effective date of such order."

Section 13, Title 7, United States Code provides in pertinent part:

"Any person who shall violate the provisions of sections 6-6e, 6h, or 6i of this title . . . shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not more than $10,000.00 or imprisoned for not more than one year; or both, together with the costs of prosecution."

Section 150.10, Title 17, Code of Federal Regulations provides in pertinent part:

"(a) Position limit . . . [N]o person may hold or control a net long or net short position in excess of . . . (3) 150 carlots in the May potato future."

STATEMENT

Petitioner, Samuel Cohen, together with his sons Alan Cohen and Joel Cohen and Mr. Ivar Blacker, was charged in a 15 count indictment with violations of 7 U.S.C. §§ 6 (a) and 13, Title 17, Code of Federal Regulations §150.10 and 18 U.S.C. §§ 2 and 371. Count one charged all four defendants with a conspiracy to defraud the United States and to commit offenses against the United States by violating 7 U.S.C. § 6(a) in that they exceeded the trading limits on potato futures set by the Commodity Exchange Commission acting pursuant to 17 C.F.R. §150.10. Counts two through twelve charged Petitioner, Samuel Cohen, to-

gether with one or more of the other defendants, with having sold May, 1966 potato futures on a specific date in amounts which resulted in giving the defendants a net short position with respect to such commodity in excess of 150 carlots, the trading limit fixed by the Commodity Exchange Commission. Counts 13 through 15 charged all four defendants for each of three separate days with violating the limit on trading fixed for one business day by the Commission on trading in potato futures.

The case was tried to the Court without a jury (App. 17-18).[1] The defendants Alan Cohen, Joel Cohen and Ivar Blacker were acquitted of all counts (App. 171). Samuel Cohen, petitioner, was acquitted of the conspiracy, count one, and convicted on each of counts two through fifteen (App. 171) and sentenced to pay a fine of $10,000.00 on each of the counts, consecutively, or a total fine of $140,000.00 (App. 179).

On appeal to the Second Circuit the petitioner raised three distinct issues. Two of these issues related to the substantive determination of guilt: (1) the insufficiency of the Government's evidence, and (2) since the petitioner's conviction rested on an agreement with his co-defendants, their acquittal for lack of knowledge precluded a finding of petitioner's guilt.

The third issue raised on appeal attacked the validity of the cumulative sentencing: since the provisions of the Commodity Exchange Act made criminal a sale which resulted in giving a trader a position in excess of the permissible position limit, any further sales above such limit were merely part of one course of conduct and could not be cumulatively punished. This issue related only to

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[1] Citation is to Petitioner's Appendix filed in the Court of Appeals.

counts two through twelve of the indictment. As previously indicated counts two through twelve charged the petitioner with trading in May, 1966 potato futures in amounts which "resulted in giving" the defendants a position in excess of the Commodity Exchange position limit. To sustain its burden under these counts, the Government charged that each short sale consummated after the net short position limit of 150 carlots of May potato futures had been reached "resulted in giving" the defendants a net short position in excess of the maximum (App. 6-7). Thus, count two alleged that Samuel Cohen on December 9, 1965, while holding a net short position of 100 carlots, sold an additional 100 carlots short. This gave him a net short position of 200 carlots "resulting in" his exceeding the regulatory maximum. Count three thereupon charged that while Samuel Cohen maintained a net short position of 200 carlots, on December 15, 1965, he sold another 50 carlots short. Though this alleged transaction would have raised the petitioner's net short position from 200 carlots, already in excess of the position limit, to 250 carlots, the Government alleged it too "resulted in giving" the Defendant a net short position in excess of the trading limit. Counts four through twelve are analogous to count three in that in each instance, the defendant's initial alleged position was already in excess of 150 carlots short. The foregoing analysis is readily reflected in Government Exhibit 130, a summary of the trading done by each of the defendants. (App. 14).

The district court judge found Samuel Cohen guilty on each of the foregoing counts and imposed a cumulative fine of $110,000.00—ten thousand dollars on each of the eleven counts.

The Court of Appeals affirmed the petitioner's conviction and on November 19, 1971 denied his Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

Where the Commodity Exchange Act makes criminal a sale which "results in giving" a trader a futures position in excess of permissible position limits, further sales above such limits are merely part of one course of conduct and are not cumulatively punishable.

The decision of the Court below presents for the first time a judicial interpretation of the criminal sanctions of the Commodity Exchange Act and its regulations on trading limits. The determination by the Court below in favor of cumulative sentencing[2] for each commodity sale in excess of such trading limits is founded on two conclusions: (1) that the statute[3] is unambiguous in defining each unit of prosecution, and (2) that this Court's decision in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), "has received rather limited application beyond the specific situation there presented", and therefore, is inapplicable to the instant proceeding. *United States* v. *Cohen*, 448 F.2d 1224, 1227 (2d Cir. 1971), (App. 7). In each instance the questionability of such premise furnishes this Court with the opportunity to clarify the principles of criminal statutory interpretation and the sentencing resultant therefrom.

The Court below determined that 7 U.S.C. §6a is unambiguous in making it unlawful for a person "to buy or sell, or agree to buy or sell" futures in excess of au-

[2] The district court herein, as previously noted, imposed a maximum $10,000.00 fine on each of the eleven counts or a cumulative fine of $110,000.00.

[3] 7 U.S.C. §6a.

thorized limits 448 F.2d at 1227, (App. 6). From this conclusion it held that each purchase or sale in excess of such authorized limits must constitute a violation. 448 F.2d at 1227, (App. 6). While the Court's initial premise may accurately reflect the purpose of the statute, it does not dictate a finding that each sale in excess of the limit reflects a distinct unit of prosecution subject to sentencing. Nowhere within the statute or the Commodity Exchange Commission's regulation is it explicitly stated that once the position limit is exceeded by a trader, each subsequent purchase or sale thereafter by that trader in excess of that limit generates an additional breach subject to criminal prosecution. Indeed, a careful reading of the statute indicates a contrary Congressional intent, since the statute specifically directs that only the purchase or sale of a commodity *"that shall result in giving"* a position in excess of the trading limit set by the Commission shall constitute a breach of the regulation. 7 U.S.C. §6a(2)(B). (Emphasis added).

If the Government's proof was sufficient to support each allegation asserted under counts two through twelve, then only the count two short sale could initially exceed or "result in" a new short position in excess of the position limit. The other charged short sales (counts 3-12) would merely constitute a continuation of the same offense. In other words, the apparent evil to be curbed under the statute is the course of conduct which gives rise to the overstepping of the position limits established by the Commission. Thus, it is readily apparent that 7 U.S.C. §6a may not be as unambiguous in the direction of multiple offenses as the Second Circuit's opinion would leave one to believe. Unless this Court, however, corrects such interpretation, this opinion will stand as substantial authority for multiple sentencing.

In *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218 (1952), this Court set forth the principle of lenity in the interpretation of criminal sanctions. If neither the wording of the statute nor its legislative history explicitly defines the unit of prosecution, then this Court requires that the less harsh meaning be adopted. *Bell* v. *United States*, 349 U.S. 81; *Prince* v. *United States*, 352 U.S. 322; *Ladner* v. *United States*, 358 U.S. 169; *Toussie* v. *United States*, 397 U.S. 112. This policy of lenity means that the Court will not increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. This policy puts a burden on the Congress to clearly define its intended unit of prosecution.

In restricting *United States* v. *Universal C.I.T. Credit Corp.* to its facts, the Second Circuit has attempted to significantly reduce the applicability of the doctrines set forth therein. Furthermore, it has done so without any indication of such direction by this Court. On the contrary, this Court itself has just recently relied to a great extent upon the principles expounded in *Universal C.I.T.* in *Toussie* v. *United States*, 397 U.S. 112. Unless this petition for certiorari is granted, the opinion of the Second Circuit herein will stand as authority for the strict limitation of the principles set down in *Universal C.I.T.* The instant proceeding offers the opportunity for this Court to correct the Second Circuit's apparent misunderstanding of the vitality of *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), and to re-establish and affirm the procedures and principles to be used by the lower courts in determining a criminal statute's unit of prosecution.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1015—SEPTEMBER TERM, 1970.

(Argued July 13, 1971 Decided October 1, 1971.)

Docket No. 71-1804

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAMUEL COHEN,

Defendant-Appellant.

Before:

FRIENDLY, *Chief Judge,*
LUMBARD and OAKES, *Circuit Judges.*

Defendant appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York after a non-jury trial, Walter R. Mansfield, *Judge,* based upon violations of Commodity Exchange Commission trading requirements, 7 U.S.C. §§6a and 13 and 17 C.F.R. §150.10.

Affirmed.

HARVEY M. SILETS (Harris, Burman & Silets, Chicago, Illinois, Theodore A. Sinars, of counsel), *for Defendant-Appellant.*

JOHN H. DOYLE III, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Jack Kaplan, Assistant United States Attorney, of counsel), *for Plaintiff-Appellee.*

OAKES, *Circuit Judge:*

The appellant, Samuel Cohen, appeals from the judgment of conviction entered by Judge Mansfield, sitting without a jury. Conviction was on Counts Two through Fifteen of a fifteen count indictment, charging in Count One essentially a conspiracy to defraud the Commodity Exchange Commission (hereinafter the "Commission") and to violate 7 U.S.C. §6a by exceeding Commission trading limits; charging defendants in Counts Two through Twelve with eleven specific instances of trading in potato futures in excess of 150 carlots, the Commission's trading limit; and charging defendants in Counts Thirteen through Fifteen with selling and buying in excess of the one-day limit for trading in potato futures, also 150 carlots. Appellant's co-defendants, his two sons and a business associate, were acquitted on all counts, as was appellant on the conspiracy count. Appellant argues that there was insufficient evidence on which to convict him on any count, that the acquittal of the other defendants precludes his conviction, and that the imposi-

tion of a fine of ten thousand dollars on each of Counts Two through Twelve, or a total of $110,000, was improper under the statute.

Trading in potato futures is done on the New York Mercantile Exchange in 50,000 pound units, *i.e.*, carlots, and involves entering into contracts to buy or sell these units at a particular future time, here May 1966. Trading in May 1966 potatoes began in June 1965 and ended on May 10, 1966. Appellant's trading, done through F. J. Reardon, Inc., a futures broker or commission merchant, commenced on September 29, 1965, and consisted primarily of contracting to sell May 1966 potatoes and, as is almost universally done in futures trading, liquidating the consequent "short" position by purchases prior to the May 11, 1966, deadline for delivery.

Trading in potato futures, as for other commodities, is limited by statute and by the regulations issued by the Commission. The statute here requires the Commission to fix a trading limit and makes it unlawful "directly or indirectly" to buy, sell or agree to buy or sell any amount of a regulated commodity "during any one business day in excess of any trading limit fixed for one business day by the commission," 7 U.S.C. §6a(2)(A), or any amount of such commodity "that shall result in giving such person a net long or net short position at any one time . . . in excess of any trading limit fixed by the commission . . .," 7 U.S.C. §6a(2)(B). The Commission regulations in effect for appellant's trading fix the "limit on the maximum net long or net short position which any person may hold or control" on the May potato futures at 150 carlots, 17 C.F.R. §150.10 (a)(3), and the "limit on the maximum amount of potatoes which any person may buy . . . [or] sell . . . during any

one business day" as 150 carlots, 17 C.F.R. §150.10(b)(3). Appellant does not dispute the trial court's finding that he had knowledge of the trading limits. Rather, he claims that the trading in May 1966 potato futures done by his two sons and his business associate cannot be treated as trading by him so as to constitute "indirect" trading in violation of the statute. Thus he claims not to have exceeded the Commission's limits for one person's daily trading or for a maximum net long or short position which any person may hold or control, in violation of the Commission regulations.

Our examination of the record convinces us that there was ample evidence to support the trial court's finding that, in order to evade the Commission's limits for trading, appellant used his co-defendants and their accounts with F. J. Reardon, Inc. The Government's evidence, through employees of the broker, was that appellant himself placed the orders not only for his own account but also for the accounts of his two sons and his business associate. These employees, despite trading by the co-defendants on numerous occasions in substantial amounts in December 1965 and the first five months of 1966, at best "vaguely" recalled talking to these co-defendants; the order tickets for them usually bore the letter "S" or "SC" or the name "Sam" or "Sam Cohen," indicating to the employees that the orders were in fact for appellant's account.

More importantly, the pattern of trading clearly revealed that the trades executed in the co-defendants' names were for appellant's purposes. At the very moment appellant reached his 150 carlot limit, on December 9, 1965, trading in his son Joel's account commenced. Similarly, trading in the account of his business associate, Blacker, did not com-

mence until January 17, 1966, when the accounts of appellant and his son Alan were already at the 150 carlot limit and the very day that the account of appellant's son Joel reached its limit. The facts that from September 29, 1965, until October 21, 1965, there was a relatively small short position in Alan Cohen's account, and that there was some trading by appellant in *April* as opposed to May futures, and that in April 1966 appellant was under his trading limit while trades were being made in the others' accounts, go only to the weight of the evidence. Individually or collectively these facts do not negate the inferences drawn by the lower court from appellant's pattern of trading. That pattern, we believe, supports the conclusion that appellant's aim was to evade the Commission's trading limits.

In addition, the futures broker sent order confirmations to appellant's sons in care of appellant at his Miami hotel; appellant signed the names of his sons and business associate on letters addressed to the broker authorizing it to file the required reports with the Commodity Exchange; extensions of credit were made by appellant to all three of the co-defendants; the closing checks issued by the broker to the co-defendants were endorsed by appellant in the names of the payees; and, in the case of one of the checks payable to the business associate, Blacker, the check was endorsed by Blacker in blank and then endorsed by appellant and deposited to appellant's account.

Taking the evidence on the placement of orders and communication with the broker, the pattern of trading, and the other indicia of appellant's control over the trading accounts and their proceeds in the light most favorable to the Government, as we are required to do, *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963), we think the trial court was justified in finding,

guilt. The finding is supported by each of the theories advanced by the Government, namely that, contrary to 7 U.S.C. §6a(2), appellant was "directly or indirectly" trading beyond Commission limits, or that the limits were exceeded, because 17 C.F.R. §150.10(f) makes the limit applicable "to positions held by, and trading done by, two or more persons acting pursuant to an express or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single individual."

The judge's acquittal of the co-defendants does not undermine his conclusion of appellant's guilt. The trial court found that the co-defendants "lent themselves" to appellant's unlawful conduct, but it could not find wrongful intent and willfulness on their part beyond a reasonable doubt; as the record stands, they may or may not have had knowledge of the trading limits.

The question of penalty is also raised. Does the statute as it read at the time of the offense and indictment make each individual transaction in excess of Commission limits a violation, in which case the trial court must be upheld, or does it apply only to a single course of conduct, in which event, if such course is continuous in nature as appellant's conduct here might be said to have been, only one violation warranting one $10,000 fine occurred? Appellant does not dispute the validity of the $10,000 fines on each of Counts Thirteen through Fifteen, although the trading on March 4, 1966, constituted a violation of both the position and the daily limits.

We think the statute unambiguous in making it unlawful for a person "to buy or sell, or agree to buy or sell" futures in excess of the authorized limits. Each purchase or sale or contract to buy or sell in excess of authorized limits

thus constitutes a violation, just as in the case of mail fraud and securities fraud. *Sanders* v. *United States*, 415 F.2d 621, 626 (5th Cir. 1969), *cert. denied*, 397 U.S. 976 (1970). *See also United States* v. *Greenberg*, 30 F.R.D. 164, 168 (S.D.N.Y. 1962); *United States* v. *Hughes*, 195 F. Supp. 795, 799 (S.D.N.Y. 1961). While it is true that *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1962), held that certain Fair Labor Standards Act violations constituted but one course of conduct that could not support an independent sentence for each violation, this was in a case where Congress had not spoken unambiguously. In the present case Congress expressed in the statute a clear intention to eliminate excessive futures trading that can cause sudden or unreasonable fluctuations. Furthermore, as we pointed out in *United States* v. *Cohen*, 384 F.2d 699, 700 (2d Cir. 1967), the *Universal C.I.T.* case "has received rather limited application beyond the specific situation there presented."

It may be that appellant's argument would carry more weight under the commodity trading statute now in effect. In an attempt to close the loopholes evident in an enactment that was applicable only to purchases and sales or agreements to purchase and sell, Congress amended the act, along the lines of the broader language of the Commission regulations, to apply to a person holding or controlling a position in excess of position limits.* We need not

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* Subparagraph (B) was amended in 1968, Pub. L. 90-258, 82 Stat. 26, 27, to make it unlawful "directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity: *Provided*, That such position limit shall not apply to a position acquired in good faith prior to the effective date of such order."

interpret the amended act here, however, since the statute under which appellant was properly convicted applied to individual transactions and made no exception for those transactions occurring after the position limits had once been exceeded.

Accordingly, we affirm the judgment below.